

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONTAE PHILLIPS,

Defendant-Appellant.

UNPUBLISHED

December 16, 2014

No. 318387

Wayne Circuit Court

LC No. 13-004508-FH

Before: DONOFRIO, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM

Defendant appeals as of right his jury trial convictions of possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(v), felon in possession of a firearm, MCL 750.225f, and possession of a firearm during the commission of a felony (felony-firearm) (second offense) MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to 42 months to 15 years' imprisonment for his possession of less than 25 grams of heroin and felon in possession of a firearm convictions, and five years' imprisonment for his felony-firearm (second offense) conviction. We affirm.

Defendant argues that he was denied the effective assistance of counsel. Specifically, defendant claims that defense counsel failed to cross-examine the prosecution's witnesses regarding the lack of testing for fingerprints on the recovered weapons and the lack of testing for gunpowder residue on defendant's hands and clothing. We disagree.

To preserve a claim of ineffective assistance of counsel, a defendant must make a motion for a new trial or an evidentiary hearing with the trial court. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). Defendant never moved for a new trial or a *Ginther*¹ hearing in the trial court. Defendant filed a motion to remand for a *Ginther* hearing in this Court, but his motion was denied. *People v Phillips*, unpublished order of the Court of Appeals, entered March 17, 2014 (Docket No. 318387). When an ineffective assistance of counsel claim is unpreserved, "this Court's review is limited to mistakes apparent from the record." *Heft*, 299 Mich App at 80.

¹ See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

“To demonstrate ineffective assistance of counsel, a defendant must show that his or her attorney’s performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance caused him or her prejudice.” *People v Nix*, 301 Mich App 195, 207; 836 NW2d 224 (2013), citing *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). “To demonstrate prejudice, a defendant must show the probability that, but for counsel’s errors, the result of the proceedings would have been different.” *Nix*, 301 Mich App at 207. “A defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy.” *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). This Court does not substitute its judgment for that of defense counsel on matters concerning trial strategy. *Id.*

As a preliminary matter, the record does not support defendant’s claim that defense counsel failed to pursue any argument related to the lack of fingerprinting and gunpowder residue testing. Although defense counsel did not specifically ask the testifying officers *why* they did not perform a fingerprint analysis on the recovered evidence, she did ask each officer if they performed a fingerprint analysis and whether it was their responsibility to send in the evidence for such an analysis. Likewise, while defense counsel did not ask each officer *why* they did not obtain gunpowder residue testing, she specifically asked Officer James Wiencek, the officer in charge, if he performed any gunpowder testing. Furthermore, defense counsel expressly addressed the fact that the police did not perform any fingerprint or gunpowder testing during her closing argument. Thus, defendant’s claim lacks merit.

Moreover, defendant has not shown that his defense attorney’s performance fell below an objective standard of reasonableness under prevailing professional norms. *Nix*, 301 Mich App at 207. “The questioning of witnesses is presumed to be a matter of trial strategy.” *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). There is nothing in the record to rebut the presumption that defense counsel’s manner of cross-examining the witnesses was a matter of trial strategy. *Payne*, 285 Mich App at 190. For example, defense counsel may have determined that it was more advantageous to direct the jury’s attention to gaps in the officers’ investigation instead of eliciting testimony regarding the specific reasons why the officers did not perform the fingerprint and gunpowder residue testing. Likewise, this Court has previously held that a defense attorney’s failure to further cross-examine a witness on a particular topic or “emphasize [a] matter more strongly to the jury” did not constitute ineffective assistance of counsel. *Petri*, 279 Mich App at 414. Therefore, defense counsel’s failure to specifically question the witnesses regarding why they did not perform fingerprint and gunpowder residue testing did not fall below an objective standard of reasonableness.

In addition, the record does not indicate that there is a reasonable probability that defense counsel’s deficient performance prejudiced defendant, such that the outcome of the proceeding would have been different but for defense counsel’s errors. *Nix*, 301 Mich App at 207. Defense counsel did in fact argue, in her closing argument and then again during sentencing proceedings, that there was insufficient evidence to connect defendant to the illegal activities based on the lack of fingerprint and gunpowder residue testing. Thus, there is no reasonable probability that defendant was prejudiced. Moreover, the record contains substantial support for each of defendant’s convictions. Defendant, who was standing on the porch of the house at the time police arrived, rushed inside the house when he saw the officers approaching; officers heard a gunshot upon entering the house; officers located defendant hiding in the house near evidence of

a recently fired rifle; defendant was the only person found inside the house; defendant made inculpatory statements upon being discovered by the officers; officers found photo identification for defendant, and no one else, in the house; and drugs and weapons were found in the house. Therefore, defendant has failed to demonstrate that he was denied the effective assistance of counsel.²

Affirmed.

/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood
/s/ Douglas B. Shapiro

² The prosecution raises arguments relating to the scoring of offense variable (OV) 19. However, defendant does not challenge the scoring of OV 19 or defense counsel's failure to object to the scoring of OV 19. Therefore, we do not address this issue.